Supreme Court, U.S.
FILED

No. (1)

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In The

Supreme Court of the United States

October Term, 1995

ORIENTATIONS GALLERY, INC.,

Petitioner,

vs.

BAKERY CENTRE ASSOCIATES, a Joint Venture, MARTIN Z. MARGULIES, as Managing Joint Venturer,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to review the Eleventh Circuit's decision that a party seeking appellate review must file a Rule 59(e) motion within ten days after removal of a state court appeal to federal district court under FIRREA, because that decision falls afoul of Supreme Court precedent holding that a removed case be treated as though it originated in federal district court, and otherwise conflicts with the decisions of every other circuit court which has considered the issue?

2. Should this Court grant certiorari to determine whether a motion submitted under Rule 59(e), Fed. R. Civ. Proc. is the exclusive method of obtaining federal appellate jurisdiction over a properly perfected state court appeal which is removed to District Court by a federal agency under FIRREA?[1]

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1. Subsumed in these issues is the greater question of whether Congress intended by FIRREA's passage to federalize the most traditional state law claims by authorizing their wholesale removal from state appellate courts to federal district courts.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Orientations Gallery Inc. respectfully requests that a Writ of Certiorari issue to review the decision of the Eleventh Circuit entered June 9, 1995, as rendered by denial of timely motions for rehearing and suggestion of rehearing *en banc* on February 28, 1996.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 54 F. 3d 688 and is reproduced in the appendix filed herewith ("App.") at 5a. The unreported opinion of the district court is reproduced at 10a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on February 28, 1996. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(l).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions at issue are 12 U.S.C. § 1441a(l)(3)(A) (as amended effective February 1, 1992):

> **(3) Removal and remand**
>
> **(A) In general**
>
> The corporation, in any capacity and without bond or security, may remove any action, suit, or proceeding from a State court to the United States district court with jurisdiction over the place where the action,

> suit, or proceeding is pending, to the United States district court with jurisdiction over the principal place of business of any institution for which the Corporation has been appointed conservator or receiver if the action, suit, or proceeding is brought against the institution or the Corporation as conservator or receiver of such institution. The removal of any such suit or proceeding shall be instituted —
>
> > (i) not later than 90 days after the date the corporation is substituted as a party, or
> >
> > (ii) not later than 30 days after service on the Corporation, if the Corporation is named as a party in any capacity and if such suit is filed after August 9, 1989

and

12 U.S.C. § 1819(b)(2)(B) (as amended effective February 1, 1992):

> **(B) Removal**
>
> Except as provided in subparagraph (D), the Corporation may, without bond or security, remove any action, suit, or proceeding from a State Court to the appropriate United States District Court before the end of the 90-day period beginning on the date the action, suit,

or proceeding is filed against the Corporation or the Corporation is substituted as a party.

STATEMENT OF THE CASE

This case originated as a simple commercial eviction action in a Florida state court of limited jurisdiction. The eviction action ultimately became moot.

Orientations Gallery, Inc. ("the tenant") asserted various claims, including damage claims against its landlord, Margulies and HMF Investments, Inc. ("the landlord") and the landlord's lender, Flagler Federal Savings & Loan Ass'n of Miami ("the lender").

The trial court dismissed all of the tenant's claims for failure to state a cause of action. The tenant appealed the order of dismissal to an intermediate state appellate court. (App. 6a). This appeal was timely. However, the Resolution Trust Corporation ("RTC") was appointed the lender's receiver, and removed the state court appeal to a federal district court for the Southern District of Florida, under FIRREA.

Both tenant and landlord filed motions to remand the case to state court within one week after removal. Those motions were never heard by the district court and were withdrawn. Three weeks after removal, Hurricane Andrew struck South Florida destroying *inter alia* the office of tenant's counsel of record. (R. 2-12).[2]

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2. Acting on an emergency basis, the Florida Supreme Court granted all litigants an automatic two week stay of court proceedings through September 7, 1992, and suggested that further extension be considered on an *ad hoc* basis. *In re Emergency Petition to Extend Time Periods Under All Florida Rules of Procedure*, 17 Fla. L. Wkly. S578 (Fla. 1992). Landlord's counsel, as a professional courtesy, alerted the district court on the tenants behalf that the earliest date the tenant could file pleadings was September 21, 1992 (R. 2-12).

On September 29, 1992, two months after removal, Orientations filed a motion asking the district court to reconsider, reexamine and vacate the state court orders of dismissal. In a written decision, the district court held that it had no jurisdiction to consider the motion, because it was not timely filed within 10 days of removal under Rule 59(e), Fed. R. Civ. P., pursuant to the procedure outlined by the Eleventh Circuit in *Jackson v. American Savings Mortgage Corp.*, 924 F.2d 195 (11th Cir. 1991). The district court thus ordered that the state court orders of dismissal stand and that the federal court case be closed. (App. 7a).

The Eleventh Circuit affirmed. *Bakery Centre Associates v. Orientations Gallery, Inc.*, 54 F.3d 688, 689 (11th Cir. 1995). In doing so, the Court noted that "[o]ther circuits that have addressed this issue have adopted various procedures for validation by a district court of a state court judgment after removal" and that *none* had embraced such a rigid requirement. (App. 8a). However, the Eleventh Circuit held that it was bound by *Jackson* and its progeny "unless and until they are overruled by an intervening Supreme Court decision or by the Eleven Circuit sitting *en banc*." (App. 9a). The Eleventh Circuit denied the tenant's motion for rehearing and suggestion of rehearing *en banc* on February 28, 1996, (App. 3a), but subsequently stayed its mandate until May 16, 1996 pending petition for certiorari to this Court. (App. 1a).

REASONS FOR GRANTING THE WRIT

This seemingly small state case raises several important federal issues. Chief among these is the impact of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) on federal court jurisdiction.

In *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*,

415 U.S. 423, 94 S. Ct. 1114, 39 L. Ed. 2d 435 (1974), this court held that a state court case removed to federal court be treated as though it originated in federal court.

All circuit courts considering the issue have held that FIRREA authorizes the FDIC and RTC to remove cases from a state appellate forum. The Circuits are in disarray over the appropriate method of obtaining federal appellate jurisdiction over these appellate-removed cases.

The Eleventh Circuit requires a party to move to vacate the underlying state court judgment within ten days following removal, or face dismissal of its appeal for lack of jurisdiction. In the Court below, the Eleventh Circuit affirmed dismissal of the appeal on this basis.

Further review of the Eleventh Circuit's decision is required because: (1) it is in conflict with *Granny Goose* in that it places a new post-removal impediment on a party's right to review; and (2) the Eleventh Circuit's decision has been rejected by all six Circuit Courts of Appeal subsequently considering the issue. Simply stated, uniformity in the law is required so that a party's right to appellate review is not contingent upon the circuit that they are located in.

I.

GRANNY GOOSE, PRINCIPLES OF FEDERALISM AND COMITY, AND SOUND PUBLIC POLICY PRECLUDE THE IMPOSITION OF NEW IMPEDIMENTS TO FEDERAL REVIEW, FOLLOWING THE REMOVAL OF A STATE COURT APPEAL TO FEDERAL DISTRICT COURT UNDER FIRREA.

On August 9, 1989, Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act, Pub. L. 101-73, 103 Stat. 183, 1989 U.S. Code Cong. & Adm. News, p. 86 ("FIRREA"). By imbuing the Federal Deposit Ins. Corporation (FDIC) and Resolution Trust Corporation (RTC) with superplenary powers, this statute seriously affected the relationship between state and federal courts. Among these superplenary powers was these agencies' new right to remove *post-judgment* "any action suit or proceeding from a state court to the appropriate United States District Court." *See* 12 U.S.C. § 1441a(1)(3)(A), 1441a(l)(3)(A) (as amended effective February 1, 1992), and 12 U.S.C. § 1819(b)(2)(B) (as amended February 1, 1992). Federal circuit courts have uniformly read these statutes as authorizing the removal of cases from state appellate courts at all levels and at all stages of the appellate proceedings.

Since FIRREA's enactment, federal courts have struggled with the implications of FIRREA on their own jurisdiction to hear these appellate-removed cases, as well as the appropriate method to obtain federal appellate review. The problems confronting all of these courts are the same. When a removed case is a state court appeal, should a federal district court entertain the merits of that appeal? If so, is it entertaining appellate, rather than "original" jurisdiction as proscribed by its own jurisdictional limits? Additionally, if the federal district

court is precluded from considering the merits of an appeal, by what vehicle does the pending state court appeal make its way to the appropriate federal appellate court?[3]

A brief history highlights the conflict between the Circuits. The Eleventh Circuit was the first to struggle with "attempting to fit the square peg of removal statute provisions in the round hole of existing federal court proceedings." *RTC v. Nernberg*, 3 F.3d 62, 68 (3rd Cir. 1993). Initially, it deemed a state court judgment to be a federal court judgment and authorized a federal appeal to proceed where a new federal notice of appeal was filed after removal. *See In re Savers Financial Savings Assn'*, 872 F.2d 963 (11th Cir. 1989).

In contrast, the Fifth Circuit initially held that Rule 60(b)(6), Fed. R. Civ. Proc. was the appropriate mechanism for challenging a state court judgment following its removal to federal district court under FIRREA. *FDIC v. Yancey Corp. Development*, 889 F.2d 647, 648 (5th Cir. 1989); *First Republicbank Fort Worth v. Norglass, Inc.*, 958 F.2d 117, 119 (5th Cir. 1992).

Shortly thereafter, *both* circuits revisited their initial conclusions, but went off in different directions once again. In *Jackson v. American Savings Mortgage Co.*, 924 F.2d 195, 199 (11th Cir. 1992), ("Jackson"), the Eleventh Circuit distinguished *Savers* on the basis "that the parties in that case seemed to agree on taking an appeal directly to the court of appeals, and . . . the

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3. The recurrence of these issues does not end with the December 31, 1995 termination of the Resolution Trust Corporation, 12 U.S.C. § 1441a(m)(1). The FDIC is the successor to the RTC by statute and continues to hold these same removal powers in its own right. 12 U.S.C. § 1819(b)(2)(B). Thus, the issue is one which is capable of repetition and needs to be considered by our highest court.

court would entertain the appeal in light of the lack of an objection."[4] The Court then imposed an entirely new procedural requirement that:

> [W]hen a case removed to a federal court has in it at the time of removal an order or judgment of the state trial judge which, had it been entered by a district judge, would be appealable to this court, it shall be incumbent on the party seeking an appeal first to move that the district judge modify or vacate the order of judgment.

Id.

Relying on Rule 59(e), Fed. R. Civ. Proc. (governing motions to alter or amend judgments) the Eleventh Circuit announced that a party faced with removal would henceforth have ten days to "modify or vacate" the judgment, rather than the longer time period in Rule 60(b) (governing motions to vacate judgments).

The Fifth Circuit again disagreed. Merely one month following its reliance on Rule 60(b)(6) as the procedural mechanism for review, it too changed course. *In re Meyerland Co.*, 960 F.2d 512 (5th Cir. 1992) (*en banc*), *cert. denied*, __ U.S. __, 113 S. Ct. 967, 112 L. Ed. 2d 123 (1993). In a deeply, divided *en banc* decision, the Fifth Circuit posited the only two options it thought were open to a district court following removal proceedings from a state appellate court: (1) the district court could review the state court judgment itself in an appellate

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4. Since jurisdiction cannot be conferred on a court by agreement, this "distinction" served to compound, rather than resolve, the complexities already existing in this area.

posture,[5] or (2) the district court could "take the state judgment as it finds it, prepare the record as required for appeal, and forward the case to a federal appellate court for review." *Id.* at 520. Opting for the second alternative, the Fifth Circuit reasoned that it was the most consistent with the constitutional function of an Article III district court, and provided a federal appellate court with an appropriate *federal* order to review. Moreover, it was the most consistent with this Court's *Granny Goose* decision because it imposed no additional impediments to review. *In re Meyerland*, 960 F.2d at 520:

> [I]f the notice of appeal was adequate in the state court system, it should be deemed adequate when it enters the federal courts, regardless of whether the state technical requirements for notice of appeal differ from the federal. *Granny Goose*, 415 U.S. at 435-36, 94 S. Ct. at 1122-23 (Judicial economy is promoted by providing that proceedings had in state court shall have force and effect in federal court so that pleadings filed in state court, for example, need not be duplicated in federal court.)

The present case was pending in a state appellate court after review was properly perfected, when it was removed to federal district court by the RTC over the objections of *both* of the other parties. The Petitioner/tenant was then barred from obtaining

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5. This would require the federal district court to exercise appellate, rather than original jurisdiction, over the state court judgment. (C.J. Politz, dissenting). 960 F.2d at 523. The majority thus "ma[de] no indication of the propriety of such action" because "it is not necessary to force district courts into the role when the other role available to them does not present such complex constitutional and jurisdiction issues." *Id.* at 520.

any further appellate review because its motion to "vacate" judgment was filed outside the "rigid [10 day] requirement" of the Eleventh Circuit in *Jackson*.

Since *Jackson* was decided, every other circuit court of appeal addressing the issue has disagreed with the Eleventh Circuit. These include Circuit Courts of Appeal for the First, Fourth, Fifth, Seventh, Eighth and Ninth Circuits. *See FDIC v. Keating*, 12 F.3d 314 (1st Cir. 1993); *RTC v. Nernberg*, 3 F.3d 62 (3rd Cir. 1993); *RTC v. Allen*, 16 F.3d 568 (4th Cir. 1994); *In re Meyerland, supra*; *Reilly v. Waukesha County*, 993 F.2d 1284 (7th Cir. 1993); *Metro North State Bank v. Gaskin*, 34 F.3d 589 (8th Cir. 1994); *RTC v. Bayside Developers*, 43 F.3d 1230 (9th Cir. 1994).

In rejecting *Jackson*, other circuits have concluded that it is "equivalent to saying that the state court's rulings do not survive removal — or, alternatively, that they are not subject to appellate review in any court, state or federal," and therefore falls afoul of the principles underlying *Granny Goose* and other decisions of this Court. *Reilly v. Waukesha County*, 993 F.2d at 1287. That is precisely the petitioner's position here. Despite having timely perfected its appellate rights in state court, as the result of the Eleventh Circuit's "rigid" (10-day requirement), petitioner is left without recourse to *any* court for appellate review, whether state or federal.

But for the existence of *Jackson*, which has been rejected by every other Circuit but the Eleventh, there is no question that the petitioner's federal appeal would have been timely, and would have been addressed on the merits. It is respectfully submitted that the Eleventh Circuit's *Jackson* decision relied on here is erroneous, that it is in conflict with this Court's *Granny Goose* decision and the decision of six other circuit courts of appeal, and that it raises important federal questions capable of repetition. These should be resolved by our highest court.

CONCLUSION

For all of the reasons stated, Petitioner Orientations Gallery, Inc. prays that this Court grant a Writ of Certiorari to review the decision of the Eleventh Circuit Court of Appeal.

Respectfully submitted,

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APPENDIX A — ORDER GRANTING STAY OF MANDATE UNTIL MAY 15, 1996 FILED MARCH 8, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 93-4616

BAKERY CENTRE ASSOCIATES, a joint venture,

Plaintiff-Appellee,

MARTIN Z. MARGULIES, managing joint venturer,

Plaintiff-Counterdefendant-
Appellee,

versus

ORIENTATIONS GALLERY, INCORPORATED, a Florida Corporation,

Defendant-Counterclaimant-
Third-party Plaintiff-
Appellant.

Appeal from the United States District Court for the Southern District of Florida

ORDER:

( ) The motion of *Appellant ORIENTATIONS GALLERY* for (X) stay ( ) recall and stay of the issuance of the mandate pending for writ of certiorari is DENIED.

Appendix A

(X) The motion of *Appellant ORIENTATIONS GALLERY* for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including *May 15, 1996*, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of *Appellant ORIENTATIONS GALLERY* for a further stay of the issuance of the mandate is GRANTED to and including ___, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of *Appellant ORIENTATIONS GALLERY* for a further stay of issuance of the mandate is DENIED.

s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

APPENDIX B — DENIAL OF REHEARING AND REHEARING *EN BANC* FILED FEBRUARY 28, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-4616

BAKERY CENTRE ASSOCIATES, a Joint Venture,

Plaintiff-Appellee,

MARTIN Z. MARGUILIES, managing joint venturer,

Plaintiff-Counter-Defendant-
Appellee,

versus

ORIENTATIONS GALLERY, INCORPORATED, a Florida corporation,

Defendant-Counter-
Claimant-Third-Party
Plaintiff-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion ___, 11th Cir., 19__, __ F.2d __).

Before: KRAVITCH and EDMONDSON, Circuit Judges, and EISELE*, Senior District Judge.

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* Honorable Garnett Thomas Eisele, Senior U.S. District Judge for the District of Arkansas, sitting by designation.

Appendix B

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT DATED JUNE 9, 1995

BAKERY CENTRE ASSOCIATES, a Joint Venture,

Plaintiff-Appellee,

Martin Z. Margulies, managing joint venturer,

Plaintiff-Counterdefendant-Appellee,

v.

ORIENTATIONS GALLERY, INCORPORATED, a Florida Corporation,

Defendant-Counterclaimant-Third-Party-Plaintiff-Appellant.

No. 93-4616.

United States Court of Appeals,
Eleventh Circuit.

June 9, 1995.

* * *

Appeal from the United States District Court for the Southern District of Florida.

Before KRAVITCH and EDMONDSON, Circuit Judges, and EISELE*, Senior District Judge.

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* Honorable Garnett Thomas Eisele, Senior U.S. District Judge for the District of Arkansas, sitting by designation.

Appendix C

KRAVITCH, Circuit Judge:

This appeal involves a district court's decision that it lacked jurisdiction to review a removed state court judgment. We AFFIRM.

I.

Bakery Center Associates ("BCA") and Martin Margulies sued Orientations Gallery, Inc. ("Orientations") for summary eviction in Florida state court.[1] Orientations filed a counterclaim against Margulies and H.M.F. Investments, Inc. ("H.M.F.") seeking damages for breach of contract and constructive eviction, rescission of the lease, and a declaratory judgment that the lease was void and unenforceable. The case was consolidated with a suit among the parties for nonpaying of rent. When BCA deeded the property at issue to Flagler Federal Savings and Loan Association of Miami ("Flagler"), Orientations added Flagler as a third party defendant.

The state court dismissed Orientations' third party complaint and counterclaims. Orientations appealed the dismissals to the Florida Third District Court of Appeals. While the appeal was pending, the Resolution Trust Corporation ("RTC") became Flagler's receiver and removed the appeal to federal district court pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1441a(*l*)(3)(A).[2]

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1. Our review of the record reveals a slightly different procedural history than that reported in the district court opinion.

2. Section 1441a(*l*)(3)(A) allows the RTC to "remove any action, suit, or proceeding from a State court to the United States district court."

Appendix C

One week after removal, Orientations and Margulies filed motions to remand the case to state court. The district court never ruled on these motions, and they were withdrawn. Two months after removal, Orientations filed a motion asking the district court to reconsider, reexamine, and vacate the state trial court's orders of dismissal. The federal district court held that it was without jurisdiction to review the state trial court's orders because Orientations had not filed a timely motion, pursuant to Rule 59(e), as required by *Jackson v. American Savings Mortgage Corporation,* 924 F.2d 195 (11th Cir.1991)[3] It therefore ordered that the state trial court orders of dismissal stand and that the federal case be closed.

II.

Jackson involved a state court decision which was appealed to the Alabama Supreme Court. After the appeal was filed, the Federal Savings and Loan Insurance Corporation ("FSLIC") removed to federal district court.[4] The appellant in *Jackson* filed motions asking both the district court and Eleventh Circuit to remand the case to state court.

In *Jackson,* we held that:

> when a case removed to a federal court has in it at the time of removal an order or judgment of the state trial judge which, had it been

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3. Fed.R.Civ.P. 59(e) provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

4. The RTC replaced the FSLIC as American Saving's receiver before *Jackson* was decided.

> entered by a district judge, would be appealable to this court, it shall be incumbent on the party seeking an appeal first to move that the district judge modify or vacate the order or judgment.

Id. at 199. Under *Jackson,* the exclusive procedure parties must follow upon the removal of a state appeal is the filing of a timely Rule 59(e) motion. The *Jackson* panel reasoned that, because a federal court of appeals is charged with reviewing federal district court actions, it does not have the authority to review a removed state court decision until the district court has ruled on whether to modify or vacate that judgment. Therefore, the Rule 59(e) requirement was designed to assure "that alleged errors brought before this circuit for review are in fact as well as theory the considered products of a district judge." *Id.* The *Jackson* reasoning was recently adopted by a panel of this court in *Resolution Trust Corp. v. Bakker,* 51 F.3d 242 (11th Cir.1995).

Other circuits that have addressed this issue have adopted various procedures for validation by a district court of a state court judgment after removal. None, however, has embraced as rigid a requirement as making a Rule 59(e) motion the prerequisite for federal review. *See, RTC v. Allen,* 16 F.3d 568, 573 (4th Cir.1994) (district court must enter *sua sponte* order adopting state court judgment; litigants then may file motions in district court or appeal); *RTC v. Nernberg,* 3 F.3d 62, 67-79 (3d Cir.1993) (parties may file motion to alter, modify, or open within thirty days; if motion denied or not filed, district court should adopt state judgment as its own and appeal may be taken); *Reilly v. Waukesha County,* 993 F.2d 1284, 1287 (7th Cir.1993) (state court decisions prior to removal may be reviewed on appeal even if district court does not reexamine); *In re*

Appendix C

Meyerland Co., 960 F.2d, 512, 520 (5th Cir.1992) (en banc) (parties may file Rule 60(b) motion; where no Rule 60(b) motion filed, district court should "take the state judgment as it finds it, prepare the record as required for appeal, and forward the case to a federal appellate court for review."), *cert. denied*, __ U.S. __, 113 S.Ct. 967, 122 L.Ed.2d 123 (1993). *See also, RTC v. Bayside Developers*, 43 F.3d 1230 (9th Cir.1994) (following *Allen*); *Metro North State Bank v. Gaskin*, 34 F.3d 589, 591 (8th Cir.1994) (following *Meyerland*); *FDIC v. Keating*, 12 F.3d 314, 317 & n. 4 (1st Cir.1993) (following *Meyerland*).

This panel, however, is bound by *Jackson* and *Bakker* unless and until they are overruled by an intervening Supreme Court decision or by the Eleventh Circuit sitting *en banc*. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981). Accordingly, we AFFIRM the district court.

APPENDIX D — MEMORANDUM OPINION AND ORDER FILED MARCH 24, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 92-1654-CIV-DAVIS

MAGISTRATE JUDGE BANDSTRA

BAKERY CENTRE ASSOCIATES, a joint Venture, and MARTIN Z. MARGULIES, as Managing Joint Venturer,

Plaintiffs,

v.

ORIENTATIONS GALLERY, INC., a Florida Corporation,

Defendant/Counter-Plaintiff,

v.

MARTIN Z. MARGULIES, H.M.F. INVESTMENTS, INC., and FLAGLER FEDERAL SAVINGS AND LOAN ASSOCIATION OF MIAMI, a United States Savings Association,

Counter/Third-Party
Defendants.

MEMORANDUM OPINION AND ORDER

BEFORE THE COURT are the following motions:

[1] Defendant Orientations Gallery, Inc.'s ("Orientations") Motion to Reconsider, Reexamine, for Rehearing and to Vacate Final Order (D.E. 16);

Appendix D

[2] Counter/Third-Party Defendants H.M.F. Investments, Inc. ("HMF") and the Resolution Trust Corporation's ("RTC") Motion to Dismiss Equitable Claim for Rescission (D.E. 33); and

[3] Counter/Third-Party HMF's and RTC's Motion to Dismiss Orientation's Appeal (D.E. 45).

I. PROCEDURAL BACKGROUND

Although difficult to believe from a glance at the voluminous pleadings, this action commenced as a summary eviction proceeding in state court filed by Bakery Centre Associates ("BCA") and Margulies. Orientations filed a counterclaim against the Plaintiffs for breach of contract, constructive eviction, rescission, and declaratory judgment. When BCA deeded the shopping center to HMF and Flagler Federal Savings & Loan Association of Miami ("Flagler"), Orientations amended its complaint to add a third-party claim against HMF and Flagler. The parties settled the summary eviction proceedings, but Flagler and HMF commenced an additional action for nonpayment of rent almost immediately after the settlement. The state court consolidated the rent nonpayment cause with the initial case, by then involving only the remaining issues on the counterclaim and the third-party complaint.

Margulies, HMF, and Flagler Federal thereafter successfully moved the state trial court to dismiss the counterclaim and third-party complaint, asserting that neither stated a cause of action because they failed to plead "ultimate facts" as required by Florida law. Orientations appealed the trial court orders to Florida's Third District Court of Appeal. During

the pendency of the appeal, Flagler Federal failed and the RTC, in its receivership capacity, removed the appellate case and the trial level rental nonpayment case separately to federal court on July 16, 1992. On September 29, 1992, Orientations filed its motion for reconsideration in the removed appellate case, seeking to vacate the trial court judgment. For the reasons explained fully below, this Court determines that it has no jurisdiction to review the state court judgment, and therefore denies Orientations' motion.

II. DISCUSSION

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 1441a(b)(1)(A), *et. seq.* ("FIRREA") created the RTC to assist in managing failed federal savings and loan institutions. FIRREA grants the RTC broad power to remove state court actions to federal court. Specifically, FIRREA provides for removal of "any action, suit, or proceeding from a state court to the appropriate United States district court" whenever the RTC is a party to the action. §1441a(1)(3). The RTC's removal authority under § 1441a(1)(3) encompasses proceedings on appeal in state courts. *See, e.g., In re Meyerland Co. (Fed. Dep. Ins. Co. v. Meyerland Co.)*, 960 F.2d 512, 516 (5th Cir. 1992), *cert. denied*, __ U.S. __, 113 S.Ct 1967, 122 L.Ed.2d 123 (1993).

The Eleventh Circuit has developed a procedure for parties to follow upon removal of state proceedings after entry of judgment. *Jackson v. American Mtg. Co.*, 924 F.2d 195, 198 (11th Cir. 1991). As with removal of any cause of action, all state court proceedings are deemed to have occurred in federal court. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 435-36, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974). The *Jackson*

court recognized, however, the novel dilemma faced by a federal district court confronted with a removed state case which includes a final judgment. The court is not a state appellate court and should not act as one. 924 F.2d at 198. On the other hand, direct review by the Court of Appeals is also inappropriate because that court may review only the orders of federal district courts. *Id.*

To resolve the predicament, the Circuit developed a mechanism whereby, upon removal, a party challenging a state judgment must move the federal district court to alter or amend the state trial order or judgment. *Id.* at 199. The procedure applies even when the party has already challenged the judgment on appeal in state court.[1] In this manner, the district court would review the issue on the merits, as it may appropriately do with any of its own orders, and issue a ruling which, if appealed, the Eleventh Circuit could properly examine as an order by a federal district court. *Id.* Thus, *Jackson* review essentially collapses a state appeal into the original trial court orders that form its basis.[2]

The *Jackson* rule attempted to facilitate removal of state appellate cases to federal court by converting into reality the *Granny Goose* fiction that, upon removal, all state proceedings are deemed to have occurred in federal court. *Id.* at 198. The particular procedural mechanism it adopted to provide an aggrieved party with redress, however, raises its own

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1. *Jackson* itself was removed to federal court after the filing of an appeal in the Alabama Supreme Court. *Id.* at 197.

2. As a result, the RTC's Motion to Dismiss Orientations' Appeal is moot, because removal worked a merger of the appeal with review by this Court of the trial court orders.

difficulties. *Jackson* provides that the party seeking review must file with the district court a motion under Federal Rule of Civil Procedure 59 within the ten-day filing period prescribed by the Rule.[3] Although Orientations filed the appropriate motion, and the parties responded to the motion at length, none of the parties grasped the essential deficiency of the motion: its untimeliness.[4]

Jackson does not address the obstacle faced by a party who fails to file the required motion within the prescribed period. By requiring a Rule 59 motion, the *Jackson* court at once foreclosed the availability of other potential avenues for review of a district court's own orders,[5] and imposed upon the aggrieved party the jurisdictional time limitation of Rule 59, along with the district court's incapacity to extend the filing period. *See Pinion v. Dow Chemical, U.S.A.*, 928 F.2d 1522, 1530-31 (11th Cir. 1991) ("district courts cannot grant extensions of time in a Rule 59(e) context"). Failure to file a timely Rule 59 motion upon removal, then, may well deprive the party of appellate review by *any*

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3. The court stated that "it shall be incumbent on a party seeking an appeal first to move that the district judge modify or vacate the order or judgment" by filing a Rule 59 motion within ten days from removal. *Id.* at 199 & n.9. *Jackson's* explicit allusion to Rule 59 indicates that other forms of review are inappropriate. *See Summerchase Condominium Owners Ass'n v. Resolution Trust Corp.*, 145 F.R.D. 583, 584 (S.D.Ala. 1993).

4. Orientations filed its motion on September 29, 1992, fully two months after the July 16, 1992 removal to federal court.

5. For example, had the proceedings actually occurred in federal court, Orientations could have filed a Rule 60(b)(6) motion. The more flexible Rule 60 filing period would not straitjacket the district court as does the jurisdictional filing deadline of Rule 59. *See* Fed. R. Civ. P. 60(b) (motions under Rule must be filed within "reasonable time" after judgment).

tribunal.[6] Although anomalous, the Court is unable to avoid this result, given the *Jackson* dictate that the appropriate mechanism for review of state trial court orders is a timely Rule 59 motion, and Orientations' failure to file its motion within the prescribed period.

Accordingly, this Court determines that it is without jurisdiction to review the state court judgments.

After due consideration, it is

ORDERED AND ADJUDGED that

[1] Defendant Orientations Gallery, Inc's Motion to Reconsider Reexamine, for Rehearing and to Vacate Final Order is DENIED.

[2] Counter/Third-Party Defendants H.M.F. Investments, Inc. and the Resolution Trust Corporation's Motion to Dismiss Equitable Claim for Rescission and Counter/Third-Party HMF's and RTC's Motion to Dismiss Orientation's Appeal are DENIED as MOOT.

[3] The state trial court orders dismissing this cause with prejudice shall stand. This case is CLOSED.

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6. On appeal of a Rule 59 motion properly denied for untimeliness, the Court of Appeals need not reach the merits of the motion. Indeed, penetrating the timeliness barrier and addressing the motion itself would amount to an exercise of precisely the sort of review condemned in *Jackson*. *See* 924 F.2d at 198 (direct review of state appeal by Eleventh Circuit withdraws district court authority and clashes with role of federal appellate court to review actions of federal district courts only).

Appendix D

DONE and ORDERED in Chambers at Miami, Florida, this 22nd day of May, 1993.

s/ Edward B. Davis
EDWARD B. DAVIS
UNITED STATES DISTRICT JUDGE

cc: Steven M. Goldsmith
Robert C. Maland
Robert S. Geiger
Richard Crisonino

96-1852

Supreme Court, U.S.
FILED
JUL 10 1996
CLERK

No. 95-1582

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ORIENTATIONS GALLERY, INC.

Petitioner,

v.

BAKERY CENTRE ASSOCIATES, a Joint Venture,
MARTIN Z. MARGULIES, as Managing Joint Venturer,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether certiorari should be granted to review minor differences in procedures adopted by the Courts of Appeals to address a deficiency in the provisions of the Financial Institutions Reform, Recovery and Enforcement Act that govern the authority of the now-defunct Resolution Trust Corporation to remove state appellate proceedings.

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No. 95-1582

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MARTIN Z. MARGULIES, as Managing Joint Venturer,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Bakery Centre Associates and Martin Z. Margulies, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eleventh Circuit's Opinion in this case. That opinion is reported at 54 F.3d 688.

REASONS WHY THE PETITION SHOULD BE DENIED

Certiorari should not be granted to review minor differences in procedures adopted by the Courts of Appeals to address a deficiency in the provisions of the Financial Institutions Reform, Recovery and Enforcement Act that govern the authority of the now-defunct Resolution Trust Corporation to remove state appellate proceedings.

"Like the ruins in Rome, the remains of South Miami's Bakery Centre stand as a monument to another era."[1/] So too, this case — with its bouquet redolent of emergency bank takeovers and hand-to-hand litigation between creditors of failed financial institutions and the now-defunct Resolution Trust Corporation (RTC) — is truly a remnant of another era, albeit one more recently past. The question is whether the varying approaches taken by the Courts of Appeals to the knotty procedural issues raised by removal to federal court of pending state appellate proceedings, raised before this Court in the context of a case that began its life as a simple eviction of a tenant from a failed shopping mall, warrant this Court's attention.

Respondent submits that the minor differences among the solutions offered by the courts to the boondoggle created by the Congress' failure to foresee the problems of removing appellate proceedings do not call for a writ of certiorari. Petitioner, having inexplicably neglected to follow the clearly-established procedure set forth by the Eleventh Circuit, is merely seeking to save his claim by asking the Court to adopt some other procedural variant as the governing rule.

1/ Raul Rubiera, *Space Age Colosseum?*, MIAMI HERALD, June 27, 1996 (Neighbors/Kendall at 4).

1. The Eleventh Circuit's Rule.

In 1991, the Eleventh Circuit offered its approach to the removal of state appellate proceedings by federal agencies charged with responsibility for failed financial institutions. *Jackson v. American Savings Mortgage Corporation*, 924 F.2d 195 (11th Cir. 1991). The case involved a removal of a state appellate proceeding by the RTC's predecessor, the Federal Savings & Loan Insurance Corporation (FSLIC) and raised a question of first impression in the Circuit, *i.e.*, how to process a state appeal after removal to a federal district court. *Id.* at 198.[2/] The Eleventh Circuit identified the core concern:

> If a state court judgment is deemed to have been entered by a federal district court and the district court has no opportunity to address the issues before review by this court, we are, essentially, exercising appellate jurisdiction over state court proceedings. We are, however, not a *state* appellate court. The role of a federal court of

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2/ The Eleventh Circuit had touched on the issue in *In re Savers Federal Savings & Loan Assoc.*, 872 F.2d 963 (11th Cir. 1989), but — contrary to petitioner's view of that case — did not "authorize a federal appeal to proceed where a new federal notice of appeal was filed after removal." (Pet., p.7). Rather, that case was removed after final judgment in state court *and before the institution of appellate proceedings*. *Id.* at 965. The only issue passed upon by the court was whether the FSLIC could file a timely notice of appeal, and the case did not touch upon removal of a pending *appellate* action. *Ibid.* The only other appellate decision that approached the question was *FDIC v. Yancey Camp Development*, 889 F.2d 647 (5th Cir. 1989), in which the FDIC, after having removed a pending appellate proceeding to federal court, sought to vacate the state judgment under Rule 60(b) rather than moving forward with the appeal. *Id.* at 648-49.

> appeals is to review the actions and judgment of a *federal district court* * * *.

924 F.2d at 198 (footnote omitted).

The court chose to resolve the tension between its role and the practical concerns attendant to a removal with a truly modest proposal:

> [W]hen a case removed to a federal court has in it at the time of removal an order * * * which, had it been entered by a district judge, would be appealable to this court, it shall be incumbent on the party seeking an appeal first to move that the district judge modify or vacate the order or judgment. Should the district judge refuse to modify or vacate, then the fiction that the state court judge's acts were the acts of the district judge will have been converted into reality. After the district judge enters an order refusing to modify or vacate or enters a new order or judgment, a party may appeal to this court * * *.

Id. at 199 (footnotes omitted).

This procedure "assures that the alleged errors brought before this circuit for review are in fact as well as theory the considered products of a district judge" and "prevents this court from presuming to be that which it is not — a state appellate court." *Ibid.* To give some finite limitations to the rule it had announced, the court declared that the deadlines of Rule 59(b) of the Federal Rules of Civil Procedure would apply, *i.e.*, "[t]he district judge should give a dissatisfied party ten days from the removal date to file the motion." *Id.* at 199 n.9.

The present action was instituted in state court by respondent, who sought to evict petitioner from the Bakery Centre shopping mall; petitioner counterclaimed for breach of contract, constructive eviction, and rescission. (Pet. 11a). The Bakery Centre was then deeded to its lenders (Flagler Federal Savings & Loan Association and an affiliated entity), and petitioner filed a

third-party complaint against Flagler Federal, which then added its own count for nonpayment of rent. *Ibid.* Respondent and Flagler Federal successfully moved to dismiss the third-party complaint and the counterclaim. Petitioner's appeal from the order of dismissal was pending in the state appellate court when Flagler Federal failed and the RTC was appointed receiver for the institution. *Id.* at 6a, 12a.[3]

On July 16, 1992 — approximately 18 months after *Jackson* had been decided by the Eleventh Circuit — the RTC removed both the pending trial case and the appellate proceeding to the United States District Court for the Southern District of Florida. *Id.* at 12a. While petitioner filed a motion to remand within seven days of the removal, it inexplicably failed timely to file a motion to vacate under *Jackson*'s dictates. *Id.* at 6a,12a.[4] The Eleventh Circuit thus applied *Jackson* to hold that petitioner was barred from reviving its state appeal in federal court. (Pet. 7a-9a). Having had the consequences of noncompliance with controlling circuit law visited upon it, petitioner is asking this Court — in the exercise of a power usually reserved for the resolution of important issues of federal law — to adopt some *other* rule and thereby preserve its state appeal in federal court.

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[3] The Bakery Centre, as noted at the outset of this brief, was demolished after being sold to a new owner and is currently being rebuilt. *Son of Bakery Centre*, MIAMI HERALD, March 3, 1996 at B2.

[4] The petition hints at an excuse for this dereliction, and not in complete fidelity to the record. The 10-day period for filing a motion to vacate expired on July 26, 1992; nonetheless, petitioner seems to believe it important to note that south Florida was struck by a violent hurricane "*[t]hree weeks after removal*," that the law offices of its counsel were destroyed in the hurricane, and that the Supreme Court of Florida promulgated an emergency extension of all time periods from August 23 - September 7, 1992. (Pet., p.3 n.2 (emphasis added)). These events, however, occurred almost one month after petitioner's deadline for filing its motion to vacate had expired, and appear to be of marginal pertinence, at best.

2. The View from the Circuits.

The RTC's removal powers were conferred by 12 U.S.C. § 1441a(*l*), under which provision "any civil action, suit, or proceeding to which the [RTC] is a party shall be deemed to arise under the laws of the United States" and the RTC accordingly "may remove any action, suit, or proceeding from a State court" to federal district court when it has been appointed conservator or receiver. 12 U.S.C. § 1441a(*l*)(1), (3).[2] After the advent of the Eleventh Circuit's *Jackson* decision, the other Circuits were called upon to address the amenability of state appellate proceedings to

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[2] The RTC is out of business as of December 31, 1995. 12 U.S.C. § 1441a(m)(1). Because the statute further provides that the Federal Deposit Insurance Corporation (FDIC) shall assume the RTC's "conservatorship and receivership functions," 12 U.S.C. § 1441a(m)(3), petitioner argues that the issue raised in the petition "is one which is capable of repetition and needs to be considered" by this Court notwithstanding the RTC's demise. (Pet., p.7 n.3). The FDIC, however, unlike the RTC, has limits on its removal power: the FDIC may remove "any action, suit, or proceeding" to which it is a party, with the *exception* — ignored by petitioner — of state actions in which only "preclosing rights" are involved and those "in which only the interpretation of [state] law is necessary; such actions "*shall not* be deemed to arise under the laws of the United States." 12 U.S.C. § 1819(b)(2)(B), (D) (emphasis added). The FDIC removal statute thus "restricts federal court jurisdiction over actions involving purely state law questions," while the RTC removal statute "does not exclude such cases" and allowed the RTC "to remove routine collections and foreclosure cases," *RTC v. Nernberg*, 3 F.3d 62, 68 n.3 (3d Cir. 1993). It is thus plainly the case, with the RTC closed and only the FDIC's limited removal power remaining, that far fewer run-of-the-mine state cases — such as the landlord-tenant dispute that spawned this litigation — will find their way to the local federal courthouse. That being so, there is yet less heft to petitioner's call upon this Court's certiorari power.

federal removal — with, it readily must be admitted, different approaches being taken.

What all these approaches have in common, however, is an effort by the circuits "to fit the square peg of the removal statute into the round hole of existing federal court procedures." *RTC v. Nernberg*, 3 F.3d 62, 68 (3d Cir. 1993). The courts are not making doctrinal declarations, but instead are adopting rules in the exercise of their *supervisory powers* over the district courts. *Id.* at 68; *see Matter of Meyerland*, 960 F.2d 512, 520 (5th Cir. 1992) (en banc), *cert. denied*, 506 U.S. 1049 (1993).[9] The

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[9] Thus, the Fifth Circuit chooses to have the district court "take the state judgment as it finds it, prepare the record as required for appeal, and forward the case to a federal appellate court for review." *Meyerland*, 960 F.2d at 520. The First Circuit takes the same approach, while acknowledging that the district court's adjudicatory role in this context "is limited by the awkward posture of a case removed during the pendency of a state appeal," *FDIC v. Keating*, 12 F.3d 314, 317 (1st Cir. 1993), and is joined by the Eighth Circuit. *Metro North State Bank v. Gaskin*, 34 F.3d 589, 591-92 (8th Cir. 1994); *see Reilly v. Waukesha County, Wisconsin*, 993 F.2d 1284, 1287 (7th Cir. 1993) (*dictum* approval of *Meyerland*). The Third Circuit, on the other hand, has opted to meld the *Jackson* and *Meyerland* approaches. *RTC v. Nernberg*, 3 F.3d at 68-69 (parties may move to modify or open state judgment after removal within 30 days; after passage of 30 days without motion being filed, district court shall adopt state judgment). The Fourth Circuit rejects *Meyerland* entirely, favoring "a hybrid of the Eleventh and Third Circuits' approach" under which the district court is immediately to adopt the state judgment but thereafter to consider any post-judgment motions. *RTC v. Allen*, 16 F.3d 568, 573 (4th Cir. 1994). The Ninth Circuit has aligned itself with the Fourth Circuit. *RTC v. Bayside Developers*, 43 F.3d 1230, 1236-38 (9th Cir. 1995). Petitioner offers nothing in its petition to support the notion that any of these approaches is *doctrinally* more sound than the Eleventh Circuit's rule; rather, the essence of its position is simply that an application of *any*

(continued...)

Eleventh Circuit's construct, awkward and slapdash though it may be, is no more so than the Fifth Circuit's command that a federal district court blindly adopt a state court's judgment as its own. *Meyerland*, 960 F.2d at 525 (Politz, C.J., dissenting) ("[b]y a deft brush of legal legerdemain the majority automatically vests federal appellate jurisdiction over a state court case which has, somehow, passed through the precincts of a powerless district court judge"). The circuits are, in the words of the Third Circuit, "play[ing] the hand that Congress dealt us." *RTC v. Nernberg*, 3 F.3d at 68 (citation omitted). In doing so, no doctrinal conflict is created.

One might just as easily argue, for example, that a conflict among the Circuits is created by the vagaries of local rules promulgated under the authority of Rule 47 of the Federal Rules of Appellate Procedure. In the same sense, the supervisory powers of the courts of appeals indisputably allow those courts to "formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting*, 461 U.S. 499, 505 (1983). In particular, the courts may act under their supervisory powers "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (citation omitted). And such action is generally regarded as appropriately taken to fill a procedural void, such as the Congress left in Section 1441a(*l*). *See United States v. Horn*, 29 F.3d 754, 760 (1st Cir. 1994) ("the supervisory power doctrine is interstitial in the sense that it applies only when there is no effective alternative provided by rule, statute or constitutional clause") (citation omitted).[7] The slight

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[6](...continued)

rule other than that of the Eleventh Circuit would have allowed its state appeal to have been litigated in state courts. (Pet., p.10). That one approach may be more convenient, however, does not in and of itself make this case one that cries out for review in this Court.

[7] As the Third Circuit observed in setting forth its supervisory rules in this instance:

(continued...)

variations among the circuits in the format for the removal of state appellate cases by the RTC simply does not so disturb the tranquility of the law as to warrant intervention by this Court.

CONCLUSION

Respondent requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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July 10, 1996

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[7](...continued)

> Although the customary rules-drafting process is more apt to produce a better product, we recognize the necessity of action to address cases presently being removed to federal courts, and thus adopt ... supervisory rules for the district courts within this Circuit.

RTC v. Nernberg, 3 F.3d at 68 (footnote omitted).